IN THE

Supreme Court of the United States.

OCTOBER TERM, 1955

No. [redacted] 741 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. A) reversing the judgment in the instant case is reported in 228 F. 2d 257.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether or not in a suit brought under the Federal Employers' Liability Act, Title 45 U. S. C. Section 51 *et seq.*, the burden of proof remains upon the plaintiff to produce probative facts that the defendant knew, or in the exercise of reasonable care should have known, of the presence of an object, foreign to a roadbed, upon its premises.

2. Whether in the absence of such proof, as found by the Court of Appeals, it can properly reverse the verdict and judgment entered in the trial court against the defendant and direct that judgment be entered for the defendant.

STATEMENT OF THE CASE.

Additional Material Facts.

At the time the plaintiff observed the grain leaking he was about 20 feet south of the house track switch. (R. 13.) He did not see the cinder or clinker that was, by his guess, about the size of his fist before he took the step although he had occasion to look at the ground. (R. 14.) He never noticed whether or not the clinker had been on top of the roadbed or imbedded before he made the step. (R. 15.) The parties stipulated (Deft. Ex. I; R. 45, 112) and the plaintiff testified that defendant's Exhibit I substantially represented the conditions as they existed at that locale. (R. 58.) He had never, prior to July 2, 1952, noticed large cinders around the house track switch. (R. 59-60.) On July 2 he noticed no other large cinders around the house track switch other than the one he stepped on. (R. 60-61.) He did not know when the cinder was placed there or who placed it there. (R. 62.)

The ballast used to repair the house track switch consisted of chat or cinders, the largest being about 2" in diameter. (R. 73.) The section foreman, Mr. Rector, inspected the track and switch for bad footing about twice a week. (R. 74.) No complaints of footing conditions were received by Mr. Rector following the repair work by employees of the defendant. (R. 75.) Defendant's track inspector, Mr. Oelrichs, passed over the house track switch once or twice or more a week. (R. 79.) His duty was to inspect the tracks, ties, roadbed and shoulder to correct any unsafe condition found. (R. 79.) He never received complaints about footing conditions around the house track switch. (R. 79-80.) Defendant's Supervisor of Track, Mr. Brosnahan, passed over the house track switch every three or four weeks. (R. 85.) On these trips he would inspect the ballast. (R. 85.) He had never received complaints

about the footing conditions at the house track switch at Mount Olive, Illinois. (R. 86.)

REASONS FOR DENYING THE WRIT.

1. The Decision of the Court of Appeals Does Not Conflict With Any of the Decisions of This Court and Does Not Contravene the Seventh Amendment to the Constitution of the United States.

Notwithstanding the decisions and excerpts therefrom set out on Pages 6, 7 and 8 of the petitioner's petition this Court has repeatedly made it crystal clear that under the Federal Employers' Liability Act, 45 U. S. C. Section 51, *et seq.*, the employer is not an insurer and the injured employee can only recover upon proof of negligence on the part of the employer which is the proximate cause of the injury to the employee. In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 61; 69 S. Ct. 413-417, 93 L. Ed. 497, Mr. Justice Black said:

> "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries."

To the same effect see:

Ellis v. *Union Pacific R. Co.*, 329 U. S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572.

Tennant v. *Peoria & Pekin U. Ry. Co.*, 321 U. S. 29, 32, 64 S. Ct. 409, 88 L. Ed. 520.

Since negligence, then, is the basis of the employer's liability, under the Federal Employers' Liability Act, 45 U. S. C. Section 51, *et seq.*, and not the fact that injuries occur, the petitioner had, under common law negligence principles, the burden of proving by substantial evidence that the re-

spondent knew, or by the exercise of reasonable care should have known, of the presence of the cinder or clinker in question on its premises. Noting the absence of such proof in the record the Court of Appeals held and properly so, that the decision of the trial court be reversed and that judgment be entered in favor of the respondent herein. As was said in the case of *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479, 480, 64 S. Ct. 232, 234, 88 L. Ed. 239:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co.* v. *Hughes, supra*; *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 524. Cf. *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Commissioners* v. *Clark*, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The petitioner in the instant case charged the defendant with negligence in failing to use ordinary care to furnish him with a reasonably safe place to work. To sustain his position he testified that he stepped on a cinder or clinker, on premises of the defendant, and sustained injuries. Omitted from "The Material Facts" set forth in his petition is his testimony, upon direct examination, that he never noticed whether the cinder or clinker was on top of or imbedded in the roadbed. (R. 15.) No evidence is in the record as to where the cinder came from, who placed it there or how long it had remained there. The petitioner admitted when his deposition was taken that he had never noticed large cinders in the area before (R. 59, 60), and,

without reference to the deposition, that on the day of the occurrence complained of saw only the one cinder. (R. 60, 61.) There is not even any testimony that the repair work done in the vicinity by employees of the defendant extended to the point where the petitioner fell. The Court of Appeals in its opinion (228 F. (2d) 257 at 259; Pet. App. 14) had to assume that the area involved was so affected. A finding of negligence on the part of this respondent under the meager facts presented would be purely conjectural and without the factual substance requisite for liability under the statute. From no evidence at all, except as to the presence of the clinker, the jury would have to infer that the repair work extended to the location in question, that defendant and not an outside agency negligently placed it there while making the repairs or otherwise, and that notwithstanding petitioner's direct testimony, the cinder was buried. As this Court stated in *Moore* v. *Chesapeake & Ohio Ry. Co.*, 340 U. S. 573, 578, 71 S. Ct. 428, 95 L. Ed. 547:

> "This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway* v. *U. S.*, 319 U. S. 372, 395."

It is apparent that what the petitioner seeks is to escape the burden of proof that the law casts upon him to prove the negligence of the respondent. His position seems to be that once a speculative possibility of negligence is presented, nothing further is required to present a question for the jury. No decisions of this Court nor of any other court, where cases founded upon common law principles are adjudicated, have been found by respondent nor cited by petitioner that sustain such a contention. Bare possibilities are not sufficient; as this Court stated in *Tennant* v. *Peoria & Pekin U. Ry. Co.*, 321 U. S. 29, 32, 64 S. Ct. 409, 88 L. Ed. 520:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove

> *that respondent was negligent* and that such negligence was the proximate cause in whole or in part of the fatal accident. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked'." (Emphasis supplied.)

The burden was not upon the respondent herein to prove that it was not negligent; the burden was on the petitioner to prove that it was negligent. The Court of Appeals rightly held that the petitioner failed to meet his burden of proof.

The cases decided by this Court that the petitioner urges run counter to the decision of the Court of Appeals in the instant case have one important distinguishing feature. In each uncontroverted facts existed as to positive acts for which the defendants therein, their agents or employees were responsible from which the jury could find negligence.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, the cause was remanded for a new trial and was again before this Court in 323 U. S. 574. In 318 U. S. at p. 57, it was stated "the night was dark and the yard was unlighted." In 323 U. S., it was held that the jury could find negligence from the operation of defendant's engine without a tail light as required by the rules of the Interstate Commerce Commission and a departure from the usual custom and practices in backing cars without giving adequate warning.

In *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, the defendant employer after having constructed an open trestle bridge 18 feet above the ground with little available footing and no guard rail, elected to place a hopper

car loaded with cinders on this bridge for unloading. With this obviously unsafe footing, Bailey was ordered to open a hopper with a heavy three foot wrench—work that could and should have been performed near the bridge on level ground.

In *Tennant* v. *Peoria & Pekin U. Ry. Co.*, 321 U. S. 29, employees of the defendant were violating a company rule that an engine bell must be rung when an engine is about to move.

In *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, there was a multitude of charges of negligence and specific proof of the refusal of the foreman upon request of the plaintiff to furnish competent help and equipment and express directions to proceed with insufficient help. There also, the warehouse floor provided by the defendant had an uneven place due to its having sunken in, an existing defect obvious to the defendant.

In *Lavender* v. *Kurn*, 327 U. S. 645, a mail hook on the carrier's mail car was allowed to swing freely, a condition created by and necessarily well known to the defendants.

In *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, the defendant carrier so maintained its right of way as to permit an insufficient clearance to exist between a building and a spur track over which it operated.

In *Myers* v. *Reading R. Co.*, 331 U. S. 477, a safety appliance in the nature of a defective hand brake on defendant's car that was stiff and sticking and that "kicked back" resulting in injuries to the plaintiff was challenged as to its efficiency.

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, the employer knowingly failed to adequately enclose a pit, designedly created by it, and acquiesced in its employees crossing the same.

In *Stone* v. *N. Y. C. & St. L. R. Co.*, 334 U. S. 407, the evidence showed a safer and more efficient method of removal of railroad ties and an unusual straining effort on the part of plaintiff to remove a tie as the direct result of the railroad foreman's specific order.

Thus it is apparent that in each of these cases there was a reasonable basis in the record for concluding that there was negligence on the part of the defendant therein, its agents or employees; the basis in some of the cases consisting of a hazardous physical or working condition known to the defendant railroad company and actually created by it and in the other cases there being a violation of the specific safety or operating rule promulgated by the railroad company defendant itself or by a governmental body for the safety of its employees.

These cases have not determined as contended by petitioner, that a jury can infer from an absence, not the presence, of probative facts in the record, that the respondent, and not another agency, negligently allowed the cinder to be on its premises. Especially appropriate to this case would seem to be the language of Mr. Justice Brewer who, in speaking through this Court in the case of *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 663, said:

> "* * * And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, *when there is no satisfactory foundation in the testimony for that conclusion.* If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies

any departure from settled rules of proof resting upon all plaintiffs." (Emphasis supplied.)

2. The Decision Herein Does Not Conflict With the Decisions of This Court, Cited By Petitioner As Applicable.

The petitioner states (Pet. p. 8) that the only two decisions ever decided by this Court applicable to this case are *Brown* v. *Western Railway of Alabama,* 338 U. S. 294, and *Southern Railway Co.* v. *Puckett,* 244 U. S. 571. He contends that the decision of the Court of Appeals conflicts with those decisions. No reasons are given by petitioner to support this conclusion—probably for the very good reason that they are non-existent.

In the *Brown* case the allegations of the complaint charged the plaintiff with a failure to furnish a safe place to work in that, at page 297:

> "(b) In leaving clinkers . . . and other debris along the side of track in its yards as aforesaid, well knowing that said yards in such condition were dangerous for use by brakemen, working therein and that petitioner would have to perform his duties with said yards in such condition."

The defendant's demurrer to the complaint necessarily admitted these allegations. Furthermore, this Court said in the *Brown* case, at page 297:

> "These allegations, fairly construed, are much more than a charge that petitioner 'stepped on a large clinker lying alongside the track in the railroad yards.'"

In the *Puckett* case there were present near the track of the defendant three large clinkers about six inches or eight inches in diameter. The plaintiff in that case stumbled over these clinkers and struck two old crossties overgrown with grass on the roadway of the defendant

near the clinkers. (85 S. E. 809, 810.) The plaintiff testified that if it had not been for the crossties he would not have fallen. (85 S. E. 809, 811.) Here again we have not an isolated cinder but the presence of three clinkers, two old crossties and an overgrowth of grass. The overgrowth alone is a circumstance that charges the defendant with knowledge even though the record was silent as to actual knowledge.

Clearly the Court of Appeals was correct in dismissing these cases as "inapposite". (Opin., App. 16; Pet. 9.)

3. The Decision of the Court of Appeals Does Not Set Forth a Standard of Proof In Conflict With the Decisions of This Court or Its Own Prior Decision.

Petitioner (Pet. 9) contends that the decision of the Court of Appeals conflicts with its prior decision in the case of *Spotts* v. *Baltimore & Ohio Railroad Co.*, 102 F. (2) 160. This contention is without merit. In the *Spotts* decision, the plaintiff's own testimony that the brake worked inefficiently was sufficient evidence, if believed by the jury, to sustain a verdict in his favor. After such testimony was elicited the Court of Appeals merely held that when the defendant adduced evidence from which the efficiency of the handbrake could be inferred, the Court of Appeals would not attempt to resolve the conflict according to where they thought the probable truth lay. In the instant case it was the lack of evidence to sustain the allegations of negligence charged, not conflicting evidence, that caused the Court of Appeals to reverse the decision of the trial court. Further, negligence is not the criterion for recovery under the Federal Safety Appliance Act, 45 U. S. C. Section 11; the employer must respond in damages for the injury to its employee from an inefficient handbrake, whether that inefficiency arose through the

neglect of the employer or an outside agency, and regardless of how shortly before the accident the brake became "inefficient."

The respondent submits that the *Spotts* decision in no way runs counter to the decision of the Court of Appeals in this case. Instead, as the Court of Appeals pointed out in its opinion (228 F. (2d) 257, at 260; Pet. App. 16) the common law rule that it applied to the instant case was the same as the one the Court had previously applied in the case of *Kaminski* v. *Chicago River & Indiana Railroad Co.*, 200 F. (2d) 1.

Lastly, petitioner asserts the decision of the Court of Appeals conflicts with the decisions of this Court. *Myers* v. *Reading R. Co.*, 331 U. S. 477, 483, like the *Spotts* case involved the Safety Appliance Acts and is rightly consistent therewith. Adopting petitioner's statement (Pet. 8) that the only decisions ever decided by this Court involving railroad employees injured by clinkers on the railroad right-of-way are the *Brown* and *Puckett* cases, it is respectfully submitted for the reasons hereinabove set forth under Point 2, there is no conflict between the instant decision and the decisions of this Court.

Petitioner states (Pet. 10) that the opinion of the Court below, if permitted to stand, will result in prejudice to the substantial rights of petitioner and to other persons. This statement overlooks the fact that each case is decided on its own merits and that the courts are interested in seeing that justice is accorded to the defendants as well as to the plaintiffs.

CONCLUSION.

The opinion of the Court of Appeals is fully justified by the record and is consistent with the decisions of this Court. It is respectfully submitted that this petition for a writ of certiorari should be denied.

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